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# Obscenity: the Law, a Dissenting Voice

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# Obscenity: the Law, a Dissenting Voice

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*Introduction*

The purpose of this paper is to attempt to illuminate the law with respect to regulation and prohibition of publications[1] allegedly obscene and pornographic. The writer had not been called upon to express opinions on the wisdom of the law and for this he was initially most grateful. However, it quickly became evident that this article could not be written without editorial comment and now no pretense is made that this constitutes the product of a neutral mind. Rather than clutter the main body of this analysis with editorializing it was decided to state the opinions held as a prologue to a discussion of the law itself.

(1) Although emphatically opposed to capricious censorship, along with genocide, forcible overthrow of the government, disrespect for the flag, etc., there is no inclination to embrace what appears to be the prevailing view of most commentators and the Supreme Court that whatever is in fact published is entitled to near absolute protection. Perhaps it is unrealistic to assume that there must be some satisfactory middle ground between the extremes of complete censorship and complete absence of restraint. Both alternatives appear equally undesirable.

(2) If a choice must be made the writer is inclining more and more toward favoring regulation and even censorship with respect to publications dealing with sex. It is felt, perhaps erroneously, that the great majority of American people would agree with this view were they to peruse some of the currently

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1 The terms "publications," "publisher," etc., are used throughout this paper to cover all media of communication, books, magazines, motion pictures, television presentations, pictures, paintings, etc.

protected publications the writer has looked at in the last month. Prior to this research the resume of censor s decisions found in a dissenting opinion in *Times Film Corp. v. City of Chicago*[2] had been very thought-provoking and, indeed, persuasive.

Certainly some if not all the decisions were unjustified. On reflection, however, and with the aforementioned "research" in mind, the persuasive quality has diminished considerably. In what manner was society injured because the words "rape" and "contraceptive" were deleted from the film "Anatomy of a Murder?" What great loss to the world if Henry Miller's *Tropic of Cancer* had never seen the light of day other than of the lexicon of four letter words?

On the other hand, who can say what damage to the individual and the moral fibre of the community results from lucid

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[2] 365 U. S. 43, 69-73. "A revelation of the extent to which censorship has recently been used in this country is indeed astonishing. The Chicago licensors have banned newsreel films of Chicago policemen shooting at labor pickets and have ordered the deletion of a scene depicting the birth of a buffalo in Walt Disney s *Vanishing Prairie*. Gavzer, Who Censors Our Movies? Chicago Magazine, Feb. 1956, pp. 35, 39. Recently, Chicago refused to issue a permit for the exhibition of the motion picture *Anatomy of a Murder* based upon the best-selling novel of the same title, because it found the use of words "rape" and "contraceptive" to be objectionable. Columbia Pictures Corp. v. City of Chicago, D.C.N.D. Ill., 1919, 184 F 2d 817. The Chicago censor bureau excised a scene in *Street With No Name* in which a girl was slapped because this was thought to be a "too violent" episode, Life, Oct. 21, 1948, p. 60. The New York censors banned *Damaged Lives*, a film dealing with venereal disease, although it treated a difficult theme with dignity and has the sponsorship of the American Social Hygiene Society. The picture of Lenin s tomb bearing the inscription "Religion is the opiate of the people" was excised from Potemkin. From *Joan of Arc* the Maryland board eliminated Joan s exclamation as she stood at the stake: "Oh, God, why has thou forsaken me?" and from *Idiot's Delight*, the sentence: "We the workers of the world, will take care of that." During the year ending June 30, 1938, the New York board censored, in one way or another, over five per cent of the moving pictures it reviewed. An early version of *Carmen* was condemned on several different grounds. The Ohio censor objected because cigarette-girls smoked cigarettes in public. The Pennsylvania censor disapproved the duration of a kiss. The New York censors forbade the discussion in films of pregnancy, venereal disease, eugenics, birth control, abortion, illegitimacy, prostitution, miscegenation and divorce. Ernst and Lindey, *supra*, at p. 83. A member of the Chicago censor board explained that she rejected a film because "it was immoral, corrupt, indecent, against my religious principles." Transcript of Record, p. 172. Times Film Corp. v. City of Chicago, 244 F 2d 432. The police sergeant in charge of the censor unit has said: "Children should be allowed to see any movie that plays in Chicago. If a picture is objectionable for a child, it is objectionable period." Chicago Tribune, May 24, 1959, p. 8, col. 3. And this is but a smattering produced from limited research. Perhaps the most powerful indictment of Chicago s licensing device is found in the fact that between the Court's decision in 1952 in Joseph Burstyn, Inc., v. Wilson, *supra*, and the filing of the petition for certiorari in 1960 in the present case, not once have the state courts upheld the censor when the exhibitor elected to appeal. Brief for American Civil Liberties Union as *amicus curiae*, pp. 13-14."

portrayals of adultery and fornication with the implied or expressed message that such behavior is normal and socially desirable. Consider the impressionable adolescent. It is somewhat ironic, is it not, that the State protects him or her from every conceivable danger by innumerable laws, expends tremendous sums to educate and give opportunity for growth, and is virtually powerless to regulate that which is quite likely to have the greatest influence.

(3) These views do not carry into the area of political speech where the considerations involved weigh heavily on the side of free expression. It does not appear illogical to not equate a publication advocating a change in the law of complaining of injustice in the law with a "work of art" portraying in graphic detail the intimate sex relations of human beings sunk or sinking into a state of degradation. Free society cannot exist without the former but can get along quite well without the latter.

(4) The writer has found that the most ardent champions of unrestricted publication among his acquaintances waver in their strong convictions when confronted with a concrete illustration of some of our currently protected publications. Discussions of this area in the abstract tend to be quite sterile. There exists, moreover, the feeling that if one wishes to be considered an intellectual and a modern man of the world, one must simply oppose regulation of sex publications. Otherwise one may be considered unrealistic, a prude, totally devoid of artistic and literary appreciation and lacking understanding of life as it really is.[3] For these reasons descriptions of some of the publications held to be non-obscene in recent cases have been here included. Without something tangible to refer to one simply becomes immeshed in a quagmire of semantics.

In 1960, Professors William B. Lockhart and Robert McClure published a very comprehensive, fully annotated 115 page work on the subject of obscenity.[4] The article, along with several

[3] Note in this connection a four-part statement by Editor of Playboy Magazine entitled, "The Playboy Philosophy," appearing in Playboy, Vol. 9, No. 12, Vol. 10, Nos. 1, 2 and 3. The point is again emphasized by a recent solicitation by the new publication "Eros," received through the mail. On the envelope appears the large slogan, "Intellectuals Unite." The circular itself refers to recent Supreme Court decisions, the liberation of the mind and the reaction of "prudes" everywhere.

[4] Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5 (1960).

others,[5] is obviously the product of careful research and thought and certainly covers the law up to 1960. They will be referred to frequently herein, but no attempt is made to cover the same ground. Rather, the emphasis will be on analyzing several recent United States Supreme Court decisions and to showing that from a legal aspect the issue of regulation or censorship of allegedly obscene publications has been quietly resolved.

In essence it is the thesis there that the *Roth* case,[6] hailed as a victory by proponents of censorship, is just the opposite of what it appears to be and that the principles there propounded have resulted in virtual, if not complete, immunity for the obscene and pornographic. This has come about by virtue (1) of the subsequent interpretation and application of the verbal formula of the *Roth* case; and (2) the procedural limitations imposed by the Court.

### *Interpretation and Application*

The rules of law formulated in the *Roth* case are quite easily stated. Publications dealing with sex are protected against interference by the federal government by the first amendment and against state action by the fourteenth amendment, providing only the publication has "some redeeming social importance."[7] Obscene and porongraphic publications have utterly no redeeming social importance and therefore, along with slander, libel,[8] group libel[9] and "fighting words,"[10] are not free spceech and may be regulated and prohibited. The test of obscenity is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[11]

Two dissenters, Justices Douglas and Black, would apply the

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[5] Lockhart & McClure, *Literature, The Law of Obscenity, and the Constitution*, 38 Minn. L. Rev. 295 (1954). Lockhart & McClure, *Obscenity Censorship: The Core Constitutional Issue—What Is Obscene?*, 7 Utah L. Rev. 289 (1961).

[6] Roth v. United States, 354 U. S. 476 (1957), *reversing* 237 F 2d 796 (2d Cir. 1956); Alberts v. California, 354 U.S. 476, *reversing* 138 Cal. App. 2d 909, 292 P. 2d 90 (1955). These decisions are thoroughly analyzed in Lockhart & McClure, *supra* note 4.

[7] Roth v. United States, *supra* note 6, at 484.

[8] Near v. Minnesota, 283 U. S. 697 (1931).

[9] Beauharnais v. Illinois, 343 U.S. 250 (1952).

[10] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[11] Roth v. United States, *supra* note 6, at 489.

clear and present danger test to the area.[12] Mr. Justice Harlan dissented in part and concurred in part. He would apply different standards to federal and state regulations.[13] Moreover, he objected both to the verbal formula of the majority and the fact that even attempted to formulate broad principles. Mr. Chief Justice Warren concurred on the basis of the facts before the Court, but would attach considerable significance to the intent of the purveyor.[14]

The principles enunciated in this case have engendered much speculation, confusion, and criticism. Some of the unanswered questions, without lengthy elaboration, include the following:

1. Who is the average person and how and by whom is his identity and characteristics to be determined?[15]

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[12] It appears to be conceded that there exists little concrete evidence of any connection between obscenity and overt acts. See Lockhart & McClure, *supra* note 4, at 57. Presumably if the circulation in a community of the novel *Lady Chatterley's Lover* were followed by a 100 per cent increase in adulterous relations a good case of clear and present danger of a grave and substantive evil might be established. This is obviously idle speculation as there is little likelihood that such quantum of proof will ever be available in obscenity cases. The effect of this test as applied to obscene publications would clearly result in complete immunity. Mr. Justice Black particularly has consistently maintained this position.

[13] Mr. Justice Harlan's seeming vacillation in cases following *Roth* can perhaps be explained to some extent by the different approach taken toward state and federal regulation of publications. He voted to reverse the federal conviction in *Roth* and to affirm the state conviction in *Alberts*. In Smith v. California, 361 U.S. 147 (1960), he disagreed with the Court's rationale in reversing a state conviction of a bookseller, although concurring in the result because of the exclusion of relevant evidence. In Talley v. California, 362 U.S. 60 (1960), he dissented when a state conviction for violating a municipal ordinance requiring disclosure of a publisher's identity was reversed. In Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961), he joined the majority in upholding the validity of a licensing requirement for motion picture films. He was the only dissenter in Bantam Books, Inc., v. Sullivan, 81 S.Ct. 631 (1963), where the Court enjoined the activity of a state agency curtailing free distribution. Yet it was Justice Harlan who wrote the opinion in Manuel Enterprises v. Day, 370 U.S. 478 (1962), striking down an administrative order of the Post Office Department and severely restricting federal obscenity regulation. (All these decisions are discussed *infra*.)

[14] This approach has not been adopted in any subsequent decision and was impliedly rejected in Manuel Enterprises v. Day, *supra* note 13. The definition of pornography often includes the black market for underworld character of the traffic therein. See Lockhart & McClure, *supra* note 4, at 61, particularly notes 340-42. This element of the definition appears to be of dubious validity. Presumably pornography went underground because believed to be illegal. If held protected by the Constitution it may very well come out in the open.

[15] Discussed in Lockhart & McClure, *supra* note 4, at 70-73. The authors refer to Commonwealth v. Isenstadt, 218 Mass. 543, 62 N.E. 2d 840 (1945), where the average man is described as a composite of all elements of society, including the young and susceptible, and United States v. One Book Called Ulysses, 5 F Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F 2d 705 (2d Cir. 1934), where he is re-

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2. What is the contemporary community?[16] Is is to be broken down geographically, by age, by social standing in the community, educational achievements?

3. What is meant by the "dominant theme?"[17] If the professed intention of the publisher is to show life as he believes it really is or show the desirability of free love, will this dominant theme justify anything and everything written or pictured?

4. What is meant by prurient interest? Dictionary definitions are likely to be of little assistance. One that the writer consulted led him in a rather circular path.[18] Obscenity is characterized as appeal to the prurient interest which means interest inclined or characterized by obscene thought. Pornography is defined as "obscene literature or art."

5. If the publication is concededly obscene, however this is arrived at, will it nevertheless be protected if it has literary or artistic merit and/or redeeming social importance?[19]

6. Should or does the intent of the purveyor have any significance?

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ferred to as a "person with average sex instincts." *Id.* at 84. Professors Lockhart and McClure indicate that probably this terminology is employed to distinguish older cases using the young and susceptible to judge the impact of the publication.

[16] See Lockhart & McClure, *supra* note 4, at 108-14, and the quoted portion of Manuel Enterprises v. Day, *infra* p. 620. Whatever this test does mean it apparently does not refer to the feeling or standards in a particular community. Note the difficulty inherent in instructing a jury comprised of primarily rural inhabitants on what "contemporary community standards" are. The writer would be somewhat reluctant to try and convince an east Texas jury that recently upheld publications comport to the standards of that or any other community. Mr. Justice Harlan possibly had this problem in mind in his opinion in *Roth* wherein he objected to the formulation of broad principles. He expresses distrust of what results juries might reach in obscenity cases being the *Roth* formula. Roth v. United States, 354 U.S. 476, 497-98 (1957).

[17] Discussed in Lockhart & McClure, *supra* note 4, at 88-95. The authors refer to any effort by the Court to judge the necessity of objectionable phrases or parts of a publication as putting "courts in the silly position of instructing authors how to write their books." *Id.* at 94.

[18] Barnhart, The American College Dictionary (1949).

[19] Lockhart & McClure, *supra* note 4, at 95-99. The authors conclusions are summed up as follows:

> Yet, whichever of the two competing concepts of obscenity ultimately prevails, we are convinced that material of redeeming social importance is not obscene and is entitled to constitutional protection—at least in those circumstances in which the material has social value for its primary audience. This much seems very clear at the present stage in the development of constitutional standards governing obscenity censorship. But the means for determining whether material has social value and, if so, the weight to be accorded it, are not yet at all clear. And these are crucial problems, for it is

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7 Should the material be judged on its face or on its assumed impact on the mind or its potential for encouraging overt acts of misconduct or a combination of all these?

8. Should the nature of the primary target be determinative or have any significance whatsoever or should the criterion in all cases be the judgment of, effect on or propensity toward danger to the hypothetical average man?

9. By whom and how are all these matters to be determined in the case of a specific publication?

That these are knotty questions which quite possibly cannot be satisfactorily answered can hardly be denied. After fifty-two pages of careful analysis Messrs. Lockhart and McClure emerged with the following statement:

> We are driven to the conclusion that the verbal formula for obscenity approved by the Court in the *Roth-Alberts* opinion is not a single formula at all but one that embraces all of the current definitions of obscenity, including that of the Model Penal Code. Any of these verbal formulas may be constitutionally acceptible as a definition of "obscenity," since none of them judges material by the effect of isolated passages on particularly susceptible persons. So we are left in the unhappy position of the delegates to the Geneva Conference on the Suppression of the Circulation and Traffic in Obscene Publications, who discovered that they could not define obscenity, "after which, having triumphantly asserted that they did not know what they were talking about, the members of the Congress settled down to their discussion." We know only that material tested for obscenity must be judged as a whole instead of by its parts and by its appeal to or effect upon average persons instead of the weak and susceptible. But of what it is that must be judged in this fashion, we know little save that it deal with sex in any of its many manifestations.[20]

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> easier to say that we will respect and protect material of redeeming social importance than it is to do so in practice. This is particularly true of works of art, because many people—including some police and prosecuting officers, and sometimes judges too—do not understand or appreciate them. These people neither know nor understand how the fine arts—including drama, fiction, poetry, dancing, and even music—are vehicles for the communication of ideas. Consequently, some way must be found to assure that in all obscenity cases the value of the material is first of all considered and then given its proper weight in arriving at a decision on the obscenity of material.

[20] Lockhart & McClure, *supra* note 4, at 58.

Following the *Roth* case, the 1957 term of the Supreme Court per curiam reversed four cases wherein censorship was upheld.[21] *The Game of Love* is described by the Seventh Circuit Court of Appeals as follows:

> [A] 16 year old boy is shown completely nude on a bathing beach in the presence of a group of younger girls [as a result of a boating accident]. On that plane the narrative proceeds to reveal the seduction of this boy by a physically attractive woman old enough to be his mother. Under the influence of this experience and an arrangement to repeat it, the boy thereupon engages in sexual relations with a girl of his own age. The erotic thread of the story is carried, without deviation toward any wholesome idea, through scene after scene. The narrative is graphically pictured with nothing omitted except those sexual consummations which are plainly suggested but meaningfully omitted and thus, by the very fact of omission, emphasized.[22]

The other cases involve publications which are in some respect more vile and despicable and will not be described here.

The French motion picture "Lady Chatterley's Lover" was involved in *Kingsley International Pictures Corp.* v *Regents of the University of New York*.[23] The censor had objected to the film because its "whole theme is immoral the presentation of adultery as a desirable, acceptable and proper pattern of behavior"[24] and because of certain scenes showing the gamekeeper and Lady Chatterley together in bed, undressed, the gamekeeper caressing the Lady's buttock, unzipping her dress and caressing her bare back. The dialogue accompanying these scenes was appropriate to the acts taking place.

The New York Court of Appeals held the picture to be non-obscene but upheld the censor's ban because it "alluringly portrayed adultery as proper behavior."[25] The United States Supreme Court reversed. Six opinions were written, differing

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[21] Times Film Corp. v. City of Chicago, 355 U.S. 35 (1957), *reversing* 244 F 2d 432 (7th Cir. 1957); Mounce v. United States, 355 U.S. 180 (1958), *reversing* 247 F 2d 148 (9th Cir. 1957); One, Inc., v. Olesen, 355 U.S. 371 (1958), *reversing* 241 F 2d 772 (9th Cir. 1957); Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958), *reversing* 249 F 2d 114 (D.C. Cir. 1957).

[22] Times Film Corp. v. City of Chicago, 244 F 2d 432, 436 (7th Cir. 1957).

[23] 360 U.S. 684 (1959), *reversing* 175 N.Y.S. 2d 39, 151 N.E. 2d 197 (1958).

[24] *Id.* at 687.

[25] *Ibid.*

only slightly in approach. The majority opinion by Mr. Justice Stewart stressed that the censor's act denying the freedom to advocate ideas "struck at the very heart of constitutionally protected liberty."[26] The decision marks the end of censorship of "ideological obscenity" according to Lockhart and McClure.[27] Apparently all nine justices concurred in the conclusion that the film was not otherwise obscene, although this question was not directly before the Court.

There have been a number of state and lower federal court decisions after *Kingsley Pictures,* but the two cases discussed above suffice to illustrate a point the writer wished to make here. As between the rawest of hard core pornography and the two motion pictures discussed above, which is most likely to appeal to the prurient interest of the average adult? Which will tend to incite lustful thoughts, to corrupt or deprave, to result in sexual gratification? It appears to be generally conceded that to the average person pornography is repulsive and that only the abnormal or immature find prurient interest appeal therein.[28] Because of their very susceptibility, however, the impact on these persons may not be used as a criterion for judging the material. If this reasoning is followed to its logical extreme the more repulsive the publication the less likely it can be regulated. This same conclusion is tentatively reached by Lockhart and McClure but they untie the knot by advocating a "variable" as opposed

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[26] *Id.* at 688.

> It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument disconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the real of ideas it protects expression which is eloquent no less than that which is unconvincing.

[27] Lockhart & McClure, *supra* note 4, at 39-43, 99-103. Note that the Court in the *Kingsley* case did not hold that the manner of portraying the material was protected under this approach, but only the freedom to advocate ideas. This point is emphasized by Professors Lockhart and McClure. *Id.* at 102. Nevertheless the "dominant theme" requirement together with the freedom of the publisher to advance his dominant theme as appears best to him (see note 17, *supra*) would appear to confer broad immunity both on the advocacy of the idea and the method of portrayal. Certain passages in *Lady Chatterley's Lover* best illustrate the point but, perhaps unfortunately, the court in *Kingsley* was not presented with the issue of whether these passages were obscene or not.

[28] Lockhart & McClure, *supra* note 4, at 56-58.

to a constant standard of obscenity [29] Thus the test would depend to some extent on the nature of the market, i.e., adolescents, homosexuals, etc.

The decision in *Manuel Enterprises* v *Day*[30] appears to retie the knot tighter than ever. It should be emphasized at the outset that this case involves the interpretation of "obscenity" in a federal statute[31] and that the "majority opinion" by Mr. Justice Harlan is concurred in by only one Justice.[32] Mr. Justice Black simply concurred in the result and Justices Brennan, Douglas, and Mr. Chief Justice Warren, went off on another ground. Nevertheless, none except the dissenter, Mr. Justice Clark, seemed to disagree with Justice Harlan s opinion and analysis.

The case involved a ruling of the Post Office Department barring certain magazines from the mails on the basis they were themselves obscene and also gave information where obscene matter could be obtained. The government described the publications as follows:

> The magazine contained little textual material, with pictures of male models dominating almost every page.
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> The typical page consisted of a photograph, with the name of the model and the photographer and occasional references to the model's age (usually under 26), color of eyes, physical dimensions and occupation. The magazines contained little, either in text or in pictures, that could be considered as relating in any way to weight lifting, muscle building or physical culture.
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> Many of the photographs were of nude male models, usually posed with some object in front of their genitals , a number were of nude or partially nude males with

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[29] *Id.* at 68. "We are left, then, in a quandry. Hard-core pornography, which appeals only to the sexually immature, is clearly obscene, but by the Court's definition obscene material is material that appeals to the prurient interest of the average person—for whom hard-core pornography holds little attraction."

The authors discuss and analyze the advantages and disadvantages of a variable obscenity standard as opposed to a constant standard which ignores the primary audience or the conduct of the surveyor. *Id* at 68-88. They indicate that up to that time the Supreme Court had not passed upon the question, but that several lower courts had adopted a variable obscenity standard. Cases cited include United States v. 31 Photographs, 156 F Supp. 350 (S.D.N.Y. 1957) (The Kinsey report); Matthews v. Florida, 99 So. 2d 568 (1951), *cert. denied* 356 U.S. 918 (1958) (Conviction for exhibiting obscene pictures to twelve-year-olds).

[30] 370 U.S. 478 (1962), *reversing* 289 F 2d 455 (D.C. Cir. 1961).

[31] 18 U.S.C. §1461 (1958).

[32] Mr. Justice Stewart.

> emphasis on their bare buttocks. Although none of the pictures directly exposed the model's genitals, some showed his public hair and others suggested what appeared to be a semi-erect penis , others showed male models reclining with their legs [and sometimes their arms as well] spread wide apart. Many of the pictures showed models wearing only loin cloths, "V gowns," or posing straps , some showed the model apparently removing his clothing. Two of the magazines had pictures of pairs of models posed together suggestively.
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> Each of the magazines contained photographs of models with swords or other long pointed objects. The magazines also contained photographs of virtually nude models wearing only shoes, boots, helmets or leather jackets. There were also pictures of models posed with chains or of one model beating another while a third held his face in his hands as if weeping. [33]

Because of the possible importance of this decision to the subject matter of this article, liberal portions of that part of the opinion dealing with obscenity are here reprinted (emphasis mine).

> On the issue of obscenity, as distinguished from unlawful advertising, the case comes to us with the following administrative findings, *which are supported by substantial evidence and which we, and indeed the parties, for the most part, themselves, accept*: (1) the magazines are not, as asserted by petitioners, physical culture or "body-building" publications, but are composed primarily, if not exclusively, for homosexuals, and have no literary, scienitfic or other merit; (2) they would appeal to the "prurient interest" of such sexual deviates, but would not have any interest for sexually normal individuals; and (3) the magazines are read almost entirely by homosexuals, and possibly a few adolescent males; the ordinary male adult would not normally buy them.
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> On these premises, the question whether these magazines are "obscene," as it was decided below and argued before us, was thought to depend solely on a determination as to the relevant "audience" in terms of which their "prurient interest" appeal should be judged. This view of the obscenity issue evidently stemmed from the belief that in *Roth* v. *United States*, 354 U.S. 476, 489, this Court established the following *single* test for determining whether

[33] Manuel Enterprises v. Day, 370 U.S. 478 at 489, n.13.

challenged material is obscene: "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." On this basis the Court of Appeals, rejecting the petitioners contention that the "prurient interest" appeal of the magazines should be judged in terms of their likely impact on the "average person," even though not a likely recipient of the magazines, held that the administrative finding respecting their impact on the "average homosexual" sufficed to establish the Government's case as to their obscenity

*We do not reach the question thus thought below to be dispositive on this aspect of the case.* For we find lacking in these magazines an element which, no less than "prurient interest," is essential to a valid determination of obscenity under Sec. 1461, and to which neither the Post Office Department nor the Court of Appeals addressed itself at all: These magazines cannot be deemed so offensive on their face as to affront current community standards of decency—a quality that we shall hereafter refer to as "patent offensiveness" or "indecency" Lacking that quality, the magazines cannot be deemed legally "obscene," and we need not consider the question of the proper "audience by which their "prurient interest" appeal should be judged.

Obscenity under the federal statute thus requires proof of two distince elements: (1) patent offensiveness; and (2) "prurient interest" appeal. Both must conjoin before challenged material can be found "obscene" under Sec. 1461. *In most obscenity cases, to be sure, the two elements tend to coalesce, for that which is patently offensive will also usually carry the requisite "prurient interest" appeal.* It is only in the unusual instance where, as here, the "prurient interest" appeal of the material is found limited to a particular class of persons that occasion arises for a truly independent inquiry into the question whether or not the material is patently offensive.

The Court of Appeals was mistaken in considering that *Roth* made "prurient interest" appeal the sole test of obscenity Reading that case as dispensing with the requisite of patently offensive portrayal would be not only inconsistent with Sec. 1461 and its common-law background, *but out of keeping with* Roth s *evident purpose to tighten obscenity standards.* The Court there both rejected the "isolated excerpt" and "particularly susceptible persons" tests of the *Hicklin* case, 354 U.S. at 488-489, and was at pains to point out that not all portrayals of sex could be

reached by obscenity laws but only those treating that subject "in a manner appealing to prurient interest." 354 U.S. at 487. That, of course, was but a compendious way of embracing in the obscenity standard *both* the concept of patent offensiveness, manifested by the terms of Sec. 1461 itself, and the element of the likely corruptive effect of the challenged material, brought into federal law, via *Regina*

It is only material whose indecency is self-demonstrating *and* which, from the standpoint of its effect, may *v. Hicklin.*

be said predominantly to appeal to the prurient interest that Congress has chosen to bar from the mails by the force of Sec. 1461.

There must first be decided the relevant "community" in terms of whose standards of decency the issue must be judged. We think that the proper test under this federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency. We need not decide whether Congress could constitutionally prescribe a lesser geographical framework for judging this issue which would not have the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency *Cf. Butler v. Michigan,* 352 U.S. 380.

Whether "hard core" pornography, or something less, be the proper test, we need go no further in the present case than to hold that the magazines in question, taken as a whole, cannot, under any permissible constitutional standard, be deemed to be beyond the pale of contemporary notions of rudimentary decency.

We cannot accept in full the Government's description of these magazines which, contrary to *Roth* (354 U.S. at 488-489), tends to emphasize and in some respects overdraw certain features in several of the photographs, at the expense of what the magazines fairly taken as a whole depict. Our own independent examination of the magazines leads us to conclude that the most that can be said of them is that they are dismally unpleasant, uncouth, and tawdry But this is not enough to make them "obscene." Divorced from their "prurient interest" appeal to the unfortunate persons whose patronage they were aimed at capturing (a separate issue), these portrayals of the male nude cannot fairly be regarded as more objectionable than many portrayals of the female nude that society tolerates.

> Of course not every portrayal of male or female nudity is obscene. [34]

Note that the Court neither rejects nor adopts a shifting or variable obscenity test. One can understand the reluctance of the "majority" to, in effect, require submission to a jury the question of whether a particular publication appeals to the "prurient interest" of the average homosexual. Note also the statement that usually the elements of "patent offensiveness" and "prurient interest" appeal "will tend to coalesce." As pointed out above, just the contrary would appear to be the case.[35] If the publication is "patently offensive" it has no "prurient interest" appeal to the average person. If it has "prurient interest" appeal to the average person it most likely will not be "patently offensive" and, moreover, probably has literary or artistic value.

Thus, assuming the majority of the Court will go along with Mr. Justice Harlan's refinement of the *Roth* verbal formula and it will be applied to all sex publication cases, there emerges a test for obscenity which, if literally applied, renders everything that is published non-obscene.[36]

Should this conclusion be erroneous, or should the majority of the Court reject Mr. Justice Harlan's interpretation or narrowly confine it to the specific statute, there still exists considerable doubt as to whether any publication will be found obscene and thus unprotected. First of all it is clearly evident that the Court as a whole is not easily shocked or offended. The "average person" is going to have to be extremely broadminded. Since no recent Supreme Court case has actually upheld a finding of obscenity, there is really yet no indication of just how broadminded he must be.

In any event, "ideological obscenity" is apparently immune to censorship.[37] A non-obscene "dominant theme" may and probably will protect the body of the publication. These two prin-

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[34] *Id.* at 481-489.

[35] See note 29 *supra.*

[36] The reader should not be misled by this statement. Mr. Justice Harlan did not, it is emphasized, state that the language used was to be applicable to all obscenity litigations, nor did he indicate any desire or intent to immunize pornography. Moreover, the opinion could be a reflection of his attitude toward federal censorship. See note 13 *supra.*

[37] See note 27 *supra.*

ciples are obviously closely intertwined and anyone possessing a normal imagination should be able to see the possibilities here.

In light of what the Court has both said and done since the decision in the *Roth* case, is it unwarranted to conclude that the decision has been tacitly overruled? Note also that the make-up of the Court has changed considerably and that all the dissenters or near dissenters remain.[38]
of procedural limitations.

*Procedural Limitations*

Recent decisions of the United States Supreme Court dealing with the validity of procedures utilized to control obscene publications are *Smith v. California,*[39] *Times Film Corp. v. City of Chicago,*[40] *Marcus v. Search Warrants of Property,*[41] *Manuel Enterprises v. Day,*[42] and *Bantam Books, Inc. v. Sullivan.*[43] Somewhat indirectly involved is *Talley v. California.*[44]

In the *Smith* case[45] the Court reversed the conviction of a bookseller for violating a municipal ordinance which made it unlawful "for any person to have in his possession any obscene writing (or) book in any place of business where books are sold or kept for sale."[46] The majority opinion by Mr. Jusitce Brennan held the ordinance invalid because there was no requirement that the state show "knowledge by appellant of the contents of the book—and thus the ordinance was construed as imposing a 'strict' or absolute' criminal liability."[47] The Court stressed that the absence of the scienter requirement would severely hamper the bookseller since he will be reluctant to sell anything he hasn't read. The result would be to restrict the

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[38] Gone from the Court are Justices Frankfurter and Whittaker. Mr. Chief Justice Warren and Justices Black and Douglas appear to form a hard core of opposition against regulation of sex publications. The defendant in a censorship case therefore starts out with the score 3-0 in his favor.
Further commentary will be deferred until after the analysis

[39] 361 U.S. 147 (1959), *reversing* 161 Cal. App. 2d 860, 327 P. 2d 636 (1958).
[40] 365 U.S. 43 (1960).
[41] 367 U.S. 717 (1961), *reversing* 334 S.W 2d 119 (1961).
[42] 370 U.S. 478 (1962).
[43] 83 Sup. Ct. 631 (1963), *reversing* 176 A. 2d 393 (1961).
[44] 362 U.S. 60 (1960), *reversing* 332 P. 2d 447 (1958).
[45] Smith v. California, 361 U.S. 147 (1959).
[46] *Id.* at 216.
[47] *Id.* at 149.

dissemination of both obscene and constitutionally protected publications.

> The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded.[48]

The Court refused to formulate any general rules with respect to the burden of proof the state must meet.

> We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be. Doubtless any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene, but we consider today only one which goes to the extent of eliminating all mental elements from the crime.[49]

In his concurring opinion, Mr. Justice Frankfurter objected to "doctrinaire absolutism" that would "nullify for all practical purposes the power of the State to deal with obscenity."[50] Quite probably he was referring to the separate concurring opinions of Justices Black and Douglas. Moreover, he felt the Court should give some guidance on the important issue of how much proof will suffice to establish scienter. He assumes that the majority opinion does not mean that actual reading of the publication must be shown in order to hold a bookseller responsible.

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[48] *Id.* at 153-54.
[49] *Id.* at 154-55.
[50] *Id.* at 163-64.

> No less obviously, the Court does not hold that a bookseller who insulates himself against knowledge about an offending book is thereby free to maintain an emporium for smut. How much or how little awareness that a book may be found to be obscene suffices to establish scienter, or what kind of evidence may satisfy the how much or the how little, the Court leaves for another day[51]

Mr. Justice Harlan concurred in the reversal because the trial judge excluded evidence relevant to the issue of obscenity. He dissented from the rationale of the majority opinion.[52]

Justices Black and Douglas both wrote concurring opinions. Mr. Justice Black criticized the majority view for implying that a bookseller could be punished for knowingly selling obscene publications. He restated his opinion that the first amendment's prohibitions against abridging freedom of expression are absolute and, presumably, embraces obscene and pornographic expression. Mr. Justice Douglas likewise reiterates the position he took in the *Roth* case.

*Talley v. California*[53] is involved here only tangentially The case deals with the validity of a municipal ordinance requiring that handbills contain the name and address of the publisher as applied to a handbill urging a boycott of certain named merchants and businessmen because they did not offer equal employment opportunities to Negroes, Mexicans and Orientals. Mr. Justice Black wrote the majority opinion reversing the convictions based on this ordinance.

> There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publi-

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[51] *Id.* at 161.

[52] *Id.* at 169-70.

> The striking down of local legislation is always serious business for this Court. In my opinion in the *Roth* case I expressed the view that state power in the obscenity field has a wider scope than federal power. In my view then, the *scienter* question involves considerations of a different order depending on whether a state or a federal statute is involved. We have here a state ordinance, and on the meagre data before us I would not reach the question whether the absence of a *scienter* element renders the ordinance unconstitutional. I must say, however, the generalities in the Court's opinion striking down the ordinance leave me unconvinced.

[53] 362 U.S. 60 (1960).

> cation would be of little value." *Lovell v. Griffin*, 303 U.S. at 452.
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> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.[54]

The dissenters reject this "freedom of anonymity"[55] and point to the numerous federal statutes requiring disclosure of the identity of publishers, lobbyists and distributors of political campaign literature. The public interest in preventing fraud, libel, false advertising, etc., is also alluded to. There was, moreover, absolutely no evidence that disclosure here would have resulted in any injury.

The reason for including this decision here should be apparent. If the publisher of material which is likely to be libelous has the right to anonymity the same principle should apply to the publisher to material probably obscene and pornographic. Thus if the publisher of pornography does not desire to be identified with his product he has the constitutional right to this anonymity. Of course, the *Talley* case did not involve obscene publications but what basis is there for drawing a distinction between obscenity and libel?

In *Marcus v. Search Warrants*[56] the Court unanimously held invalid a statutory procedure of the State of Missouri described by the Court as follows:

> This appeal presents the question whether due process under the Fourteenth Amendment was denied the appellants by the application in this case of Missouri's procedures authorizing the search for and seizure of allegedly obscene publications preliminarily to their destruction by burning or otherwise if found by a court to be obscene. The procedures are statutory, but are supplemented by a rule of the Missouri Supreme Court. The warrant for search for and seizure of obscene material issues on a sworn complaint filed with a judge or magistrate. If the complainant states "positively and not upon information or belief," or states "evidential facts from which such judge

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[54] *Id.* at 64.
[55] *Id.* at 70. The dissenters in this case were Justices Clark, Frankfurter and Whittaker.
[56] 367 U.S. 717 (1961).

> or magistrate determines the existence of probably cause" to believe that obscene material "is being held or kept in any place or in any building," "such judge or magistrate shall issue a search warrant directed to any peace officer commanding him to search the place therein described and to seize and bring before such judge or magistrate the personal property therein described." The owner of the property is not afforded a hearing before the warrant issues; the proceeding is *ex parte*. However, the judge or magistrate issuing the warrant must fix a date, not less than five nor more than 20 days after the seizure, for a hearing to determine whether the seized material is obscene. The owner of the material may appear at such hearing and defend against the charge. No time limit is provided within which the judge must announce his decision. If the judge finds that the material is obscene, he is required to order it to be publicly destroyed, by burning or otherwise; if he finds that it is not obscene, he shall order its return to its owner.[57]

First there is the almost inevitable discussion of Old English Star Chamber procedures. The Court then proceeded to strike down the Missouri procedure with little fanfare:

> We believe that Missouri's procedures as applied in this case lacked the safeguards which due process demands to assure non-obscene material the constitutional protection to which it is entitled. Putting to one side the fact that no opportunity was afforded the appellants to elicit and contest the reasons for the officer s belief, or otherwise to argue against the propriety of the seizure to the issuing judge, still the warrants issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be obscene. The warrants gave the broadest discretion to the executing officers; they merely repeated the language of the statute and the complaints specified no publications, and left to the individual judgment of each of the many police officers involved the selection of such magazines as in his view constituted "obscene publications." So far as appears from the record none of the officers except Lieutenant Coughlin had previously examined any of the publications which were subsequently seized. It is plain that in many instances, if not in all, each officer actually made *ad hoc*

[57] *Id.* at 718-21.

> decisions on the spot and, gauged by the number of publications seized and the time spent in executing the warrants, each decision was made with little opportunity for reflection and deliberation. As to publications seized because they appeared on the Lieutenant's list, we know nothing of the basis for the original judgment that they were obscene. It is no reection on the good faith or judgment of the officers to conclude that the task they were assigned was simply an impossible one to perform with any realistic expectation that the obscene might be accurately separated from the constitutionally protected. They were provided with no guide to the exercise of informed discretion, because there was no step in the procedure before seizure designed to focus searchingly on the question of obscenity See generally 1 Chaffee, Government and Mass Communications, pp. 200-218. In consequence there were suppressed and withheld from the market for over two months 180 publications not found obscene. The fact that only one-third of the publications seized were finally condemned strengthens the conclusion that discretion to seize allegedly obscene materials cannot be confined to law neforcement officials without greater safeguards than were here operative. Procedures which sweep so broadly and with so little discrimination are obviously deficient in techniques required by the Due Process Clause of the Fourteenth Amendment to prevent erosion of the constitutional guarantees.[58]

In the course of the opinion the Court commented that the distributor's stock of magazines runs "in hundreds of thousands probably closer to a million copies."[59] In light of the decision in *Smith v. California*[60] the distributor in this case would appear virtually immune to prosecution for possession or sale of obscene publications. How could the state possibly prove he had knowledge of the contents of all these publications?

*Manuel Enterprises v. Day*[61] has already been discussed with respect to the definition of obscenity contained therein. Also involved in that litigation was the advertising contained in the magazines allegedly giving information where obscene matter could be obtained. In this connection the Court imposed a

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[58] *Id.* at 131-33.
[59] *Id.* at 722.
[60] See notes 45-52 *supra* and accompanying text.
[61] 370 U.S. 478 (1962). See notes 30-36 *supra* and accompanying text.

scienter requirement even stricter than that required to charge booksellers with responsibility. Based on the facts of this case one could conclude the burden of proof is impossible to meet. As pointed out in Mr. Justice Clark's dissent, the petitioners must have known of the nature of the advertisement.[62] A stronger case could hardly be imagined, assuming the advertiser did not expressly state "pornography for sale."

Regulation by the Post Office Department in this area was dealt a seemingly fatal blow by the concurring opinion in this same case.

> Questions of procedural safeguards loom large in the wake of an order such as the one before us. Among them are: (a) whether Congress can close the mails to ob-

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[62] *Id.* at 526-28.

> The content and direction of the magazines themselves are a tip-off as to the nature of the business of those who solicit through them. The advertisements and photographer lists in such magazines were quite naturally "designed so as to attract the male homosexual and to furnish him with names and addresses where nude male pictures in poses and conditions which would appeal to his prurient interest may be obtained." Moreover, the advertisements themselves could leave no more doubt in the publishers minds than in those of the solicited purchasers. To illustrate: some captioned a picture of a nude or scantily attired young man with the legend "perfectly proportioned, handsome, male models, age 18-26." Others featured a photograph of a nude male with the privates obviously retouched so as to cover the genitals and part of the pubic hair and offered to furnish an "original print of this photo." Finally, each magazine specifically endorsed its listed photographers and requested its readers to support them by purchasing their products. In addition, three of the four magazines involved expressly represented that they were familiar with the work of the photographers listed in their publications.
>
> Turning to Womack, the president and directing force of all three corporate publishers, it is even clearer that we are not dealing here with a "Jack and Jill" operation. Mr. Womack admitted that the magazines were planned for homosexuals, designed to appeal to and stimulate their erotic interests. To improve on this effect, he made suggestions to the photographers as to the type of pictures he wanted. For example, he informed one of the studios listed in his publications that "physique fans want their 'truck driver types already cleaned up, showered, and ready for bed [and] it is absolutely essential that the models have pretty faces and a personality not totally unrelated to sex appeal." Womack had also suggested to the photographers that they exchange customer names with the hope of compiling a master list of homosexuals. He himself had been convicted of selling obscene photographs via the mails. Furthermore, he was warned in March, April, and July of 1959 that a number of his photographer advertisers were being prosecuted for mailing obscene matter and that he might be violating the law in transmitting through the mails their advertisements. Finally, through another controlled corporation not here involved, he filled orders for one of his advertisers sent in by the readers of his magazines. This material was found to be obscene and like all of the above facts and findings it is not contested here.

> scenity by any means other than prosecution of its sender; (b) whether Congress, if it can authorize exclusion of mail, can provide that obscenity be determined in the first instance in any forum except a court, and (c) whether, even if Congress could so authorize administrative censorship, it has in fact conferred upon postal authorities any power to exclude matter from the mails upon their determination of its obscene character.[63]

Although the concurring justices actually only decided that Congress had not given the Department authority to censor the mails they most emphatically expressed grave doubt over the validity of such procedure even if expressly authorized. Mr. Justice Clark stated this rather succinctly:

> While those in the majority like ancient Gaul are split into three parts, the ultimate holding of the Court today, despite the clear congressional mandate found in §1461, requires the United States Post Office to be the world's largest disseminator of smut and Grand Informer of the names and places where obscene material may be obtained. The Judicial Officer of the Post Office Department, the District Court, and the Court of Appeals have all found the magazines in issue to be nonmailable on the alternative grounds that they are obscene and they contain information on where obscene material may be obtained.[64]

In *Bantam Books, Inc. v. Sullivan*[65] the activities of the Rhode-Island Commission to Encourage Morality in Youth were held unconstitutional in part and enjoined. The Commission's duties consisted of educating "the public concerning any book, picture, pamphlet, ballad, printed paper or other thing containing obscen, indeceent or impure language, or manifestly tending to the corruption of the youth as defined in sections and to investigate and recommend the prosecution of all violations of said sections. "[66] In the course of performing its duty the Commission would contact distributors of publications found to be objectionable and seek their cooperation. Apparently the Com-

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[63] *Id.* at 497-98. The concurring opinion also contains a history of Post Office censorship. See also Lockhart & McClure, *supra* note 4, at 35-39; Paul and Schwartz, *Obscenity in the Mails: A Comment on Some Problems of Federal Censorship*, 106 U. Pa. L. Rev. 214 (1957).

[64] *Id.* at 519.

[65] 83 Sup. Ct. 631 (1963).

[66] *Id.* at 633.

mission was not above attempting a little coercion. The trial court found:

> The effect of the said notices [those received by Silverstein, including the two listing publications of appellants] were clearly to intimidate the various book and magazine wholesale distributors and retailers and to cause them, by reason of such intimidation and threat of prosecution, (a) to refuse to take new orders for the proscribed publications, (b) to cease selling any of the copies on hand, (c) to withdraw from retailers all unsold copies, and (d) to return all unsold copies to the publishers.
>
> The activities of the respondens [appellees here] have resulted in the suppression of the sal eand circulation of the books listed in said notices. [67]

In upholding the trial court the Supreme Court, speaking by Mr. Justice Brennan, stated

> It is not as if this were not regulation by the State of Rhode Island. The acts and practices of the members and Executive Secretary of the Commission disclosed on this record were performed under color of state law and so constituted acts of the State within the meaning of the Fourteenth Amendment. These acts and practices directly and designedly stopped the circulation of publications in many parts of Rhode Island. It is true, as noted by the Supreme Court of Rhode Island, that Silverstein was "free" to ignore the Commission's notices, in the sense that his refusal to "cooperate" would have violated no law But it was found as a fact—and the finding, being amply supported by the record, binds us—that Silverstein s compliance with the Commission s directives was not voluntary People do not lightly disregard public officers thinly veiled threats to institute criminal proceedings against them if they do not come around, and Silverstein s reaction, according to uncontroverted testimony, was no exception to this general rule. The Commission s notices, phrased virtually as orders, reasonably understood to be such by the distributor, invariably followed up by police visitations, in fact stopped the circulation of the listed publications *ex proprio vigore.* It would be naive to credit the State s assertion that these blacklists are in the nature of mere legal advice, when they plainly serve as instruments of regulation independent of the laws against obscenity

[67] *Id.* at 635-36.

> What Rhode Island has done, in fact, has been to subject the distribution of publications to a system of prior administrative restraints, since the Commission is not a judicial body and its decisions to list particular publications as objectionable do not follow judicial determinations that such publications may lawfully be banned. Any system of prior restraints of expression comes to the Court bearing a heavy presumption against its constitutional validity
>
> The procedures of the Commission are radically deficient. They fall far short of the constitutional requirements of governmental regulation of obscenity We hold that the system of informal censorship disclosed by this record violates the Fourteenth Amendment.[68]

The opinion concluded with some vague assurances that private consultations between law enforcement officials and distributors will not violate the Constitution. As pointed out by Mr. Justice Clark, the majority "drops a demolition bomb on 'the Commission's practice' without clearly indicating what might be salvaged from the wreckage."[69]

The dissenting opinion by Mr. Justice Harlan criticizes the failure of the majority to consider and weigh the juvenile delinquency problem which the Commission is endeavoring to cope with. He also criticizes the failure of the Court to clarify the status of the Commission's activities minus the threats. It is emphasized that the pronouncements of the Commission are not self-executing and therefore cannot constitute censorship without adequate procedural safeguards. If the group's activities actually result in depriving the adult public of access to protected publications this problem shoud be dealt with when it actually arises.

*Times Film Corp. v. City of Chicago*[70] is the one Supreme Court decision which departs from the over-all trend. The specific issue in that case was whether a municipal ordinance requiring motion pictures to be submitted for examination prior to public exhibition is void on its face. In a 5-4 decision the majority, speaking by Mr. Justice Clark, upheld the ordinance against this attack. The constitutionality of the standards to be

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[68] *Id.* at 638-40.
[69] *Id.* at 642.
[70] 365 U.S. 43 (1961).

utilized by the licensing board and the nature of the film itself were not issues before the Court.

> Petitioner claims that the nature of the film is irrelevant, and that even if this film contains the basest type of pornography, or incitement to riot, or forceful overthrow of orderly government, it may nonetheless be shown without prior submission for examination.[71]

After an analysis of the decision in *Near v. Minnesota*[72] the majority concluded that in relation to obscenity the examination of films beforehand does not result in invalid prior restraint. If the film is obscene it is not entitled to protection and if it is not obscene a license will theoretically be granted without restrictions. Mr. Chief Justice Warren wrote a dissenting opinion concurred in by Justices Black, Douglas, and Brennan. Mr. Justice Douglas wrote a separate dissent concurred in by the Chief Justice and Mr. Justice Black. In his opinion the Chief Justice accused the majority of approving unlimited censorship of motion pictures and of sanctioning procedures which could easily be extended to other media of communication. Numerous cases were cited and discussed, the majority of these involving publications not concerned in any way with sex.[73]

The dissent's summarization of the majority opinion as authorizing unlimited, uncontrolled censorship appears clearly erroneous as a legal proposition. One must almost wonder whether the dissenting judges were furnished the same majority opinion as the one published. A substantial portion of the dissent is thus directed at a "straw man." The very least that can be said is that the rationale of the majority was carried to its logical extreme by the dissenters and then attacked as if the majority had actually gone there.

However, the dissent also stresses the practical effect of the principles enunciated by the other five Justices, and the arguments presented along this line appear to have considerably more merit.[74] As pointed out in the opinion, the time and expense involved in appealing a censor's decision is such that

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[71] *Id.* at 47.
[72] 283 U.S. 697 (1931).
[73] A quick count shows twenty-one prior decisions cited. Of these sixteen had nothing whatsoever to do with obscenity.
[74] See quotation from opinion, note 2 *supra.*

probably in the great majority of cases the publisher will simply acquiesce in the censor's decision, even if clearly illegal. Only in those cases where the licensing board absolutely refuses to grant the license under any circumstances might it be economically feasible to judicially contest an abuse of discretion.

Both dissenting opinions elaborated upon the evils of prior restraint both in the case before the Court and in general.

Several observations should be made with respect to the *Times* decision. As indicated above, the majority certainly deviated from the pattern. The actual issue in that case was a relatively narrow one although concededly important from a practical standpoint. Moreover the Court had ample precedent for its decision. In previous litigations involving the validity of the standards to be used by the censor it was certainly implicit in the reasoning of the Court that licensing requirements were valid as such.[75]

Two members of the majority are no longer on the Court; all the dissenters remain. This fact shouldn't be overlooked either.

In short, the *Times* decision should not be relied on too strongly. It may not be the law much longer. A judicial reversal here should surprise no one.

From a procedural standpoint, then, the governing principles of law are amazingly unclouded and uncomplicated. There appears to be no way either the federal government or the state can legally prevent the publication or dissemination of obscenity. The only remedy available is the imposition of penal sanctions after a full judicial proceeding and, of course, after the deed has been accomplished. Judging from the decision in *Bantam Books,* even the activities of private pressure groups will be held invalid if there is any cooperation or participation by law enforcement officials.[76] The Court is evidently ready to condemn any procedure, other than criminal punishment, which may result in discouraging or restricting unhampered dissemination of sex publications. Only the *Times* case points in any

[75] Reference is here made to such cases as Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Superior Films, Inc. v. Dept. of Education, 346 U.S. 587 (1954); Holmby Productions, Inc. v. Vaughn, 350 U.S. 870 (1955). These decisions were based on the absence of sufficiently definite standards.

[76] See notes 65-69 *supra* and accompanying text.

other direction and even this limited exception may not be with us much longer.

*Summary and Conclusion*

In the *Roth* case the Supreme Court declared that obscene and pornographic publications were not entitled to constitutional protection as free speech. Since that time, with the exception of one decision,[77] the Court has drained the principles enunciated in *Roth* of all vitality. From the legal standpoint the barriers to effective regulation are virtually insurmountable. It will be almost as difficult to prove obscenity as to prove, for example, monopolization under the anti-trust laws.

Let us take a concrete illustration. The circular referred to previously soliciting orders for a new magazine[78] contains descriptions of articles contained therein. Note the following:

> America s Greatest Sex Experiment—An account of the mass test of "omnigamy" which took place at Oneida, N.Y., during the second half of the 19th century Every adult male had call on every adult female in this unprecedented experiment in communal conjugal relations.
>
> The Love Lives of Pirates—The fruit of years of patient research by a French scholar, this fascinating study describes the fates of noblewomen kidnapped on the high seas. Portions of diaries are reproduced.
>
> The Erotic Sculpture of India—Twenty-two pages of statuary depicting the Hindu Art of Love, photographed by Eliot Elisofon, with text by Santha Rama Rau.
>
> Love on the Beach—A documentary of amorous carryings-on down by the sea, photographed by day and by night.
>
> The Private Parts of the Public Library—A survey of the "Hell Room," "Treasure Room," "Delta Collection," "Cherry Case" and other collections of erotic literature in American public institutions which are paid for by the public but which are barred from their use.
>
> Madame Tellier's Brothel—A new, uncensored translation of De Maupassant's classic short story on prostitutes, illustrated by Degas monotypes that have never been seen before in this country
>
> The Male Prostitues of Bombay—Full-color photographs of Indian youths who make a profession of dressing and behaving like women.

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[77] Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961).
[78] Note 3 *supra.*

> Animal Sexuality—Full-color illustrations of animals in sexual congress, meticulously drawn by a German zoological illustrator.
>
> Masterpieces of Erotic Art—Reproductions of erotic paintings will be a regular feature of EROS. They will include the unknown or long-suppressed work of such masters as Rodin, Raphael, Rubens, Tintoretto, Titian, Rembrandt, Michelangelo, Beardsley, Horgath, Toulouse-Lautrec and Picasso.
>
> Vice in Old New York—A guided tour of the quarters of sin that pock-marked "New Sodom," as the city was called in Victorian times. Included are visits to the Cremorne where girls danced the cancan without undergarments, the House of All Nations where the ceilings were mirrored and the Union where nude women publicly made love to men and/or beasts.
>
> Pillow Books as Works of Art—A sublimely beautiful portfolio of pages taken from the legendary love-making manuals which are passed down from mother to daughter in Japan.

The writer has not had the opportunity to read any of these articles and consequently is not in a position to pass upon their quality or nature. These descriptions are used here purely for illustrative purposes.

Let us assume the articles hold at least as much "promise" as they appear to. Is there anyway a municipality, for example, may legally prohibit or restrict the sale of this publication, at least as far as minors are concerned?

Complaining to the postal authorities will presumably be of little help. The Department won't be able to prevent using the mails until after a full judicial proceeding, even should the publication be clearly pornographic.[79] If all sales were made through the mail local authorities would have absolutely no power thereover.

If distributed through local outlets, bookstores, magazine stands, etc., the situation does not change appreciably. Any attempt to seize the publications prior to sales or in some other manner to prevent their sale will be invalid.[80] Any attempt to coerce or solicit the cooperation of the distributors will likewise

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[79] See notes 61-64 *supra* and accompanying text.
[80] See notes 56-60 *supra* and accompanying text.

be unlawful; probably at about the point such efforts become at all effective.[81]

If the distributor is arrested and charged with possession for sale or sale of obscene publications the municipality and better prepare for a long and almost certainly unsuccessful prosecution.

Is the "dominant theme" of the material taken as a whole "appealing to the prurient interest"? The publisher of the particular magazine asserts the following about his publication:

> In EROS, the talents of the world's most gifted writers, artists and photographers have been harnessed and applied to a periodical of elegance and good taste. Subjects which are customarily sensationalized or degraded are handled in EROS with dignity and grace. The publication of EROS represents a major break through in the battle for the liberation of the human spirit.

Truly a commendable objective and one wouldn t wish to go on record as opposing the "liberation of the human spirit." If there is any semblance of truth to these assertions the matter is concluded, either because the dominant theme is not appealing to "prurient interest" or because any obscenity which exists is "ideological." Furthermore, liberating the human spirit certainly has redeeming social importance.

The issue of patent offensiveness would probably never be reached. If it were, these features at their worst would hardly be more patently offensive than the publication involved in *Manuel Enterprises*.[82]

Then there is the question of "prurient interest" appeal to the average man. Could the sale of these magazines to minors be prohibited? This appears to be the one still unresolved question or, actually, series of questions. Should the Court allow a "variable obscenity" test, numerous subsidiary issues would be spawned. What would be the verbal formula? How could it be enforced?

Finally, even if the publication should be found obscene

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[81] See notes 65-69 *supra* and accompanying text. Consider also the possibility of any concerted boycott by a private group constituting a per se violation of the Federal Anti-Trust laws. See Council of Defense v. International Magazine Co., 267 Fed. 390 (1920).

[82] See text accompanying note 33 *supra*.

the State would still have to show that the seller of the publication had knowledge of its obscene nature.[83] This could prove to be a difficult task. From the distributor's standpoint it might even be considered very unfair to impose upon him a duty to pass upon the obscenity of a publication. How is he supposed to determine as to each of hundreds of publications that which even the experts are unable to determine.

Further elaboration should not be necessary. The writer has already expressed his opinion on the present state of the law and will take only one more parting shot. It appears the Court again takes a many sided problem and focuses its entire attention on one aspect thereof to the exclusion of all others. Freedom of expression is a principle well worth protecting. Few will question this proposition. However, the writer seriously questions the wisdom of carrying this principle to ludicrous extremes. The lessons of history should have taught by now the error and the folly of extremes. Inevitably there comes a reaction and a swing toward the opposite extreme. It is felt that the Court is now laying the predicate for that reaction and is in effect endangering that which it most desires to protect. Certainly the solution to the problem of obscene publications is not an easy one but "doctrinaire absolutism" hardly seems the best approach.

Those inclined toward crowing about the current state of the law might be well advised to take note of the remark used by Mr. Justice Black in a dissenting opinion:[84] "Another such victory and I am undone."

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[83] See notes 45-52 *supra* and accompanying text.
[84] Beauharnais v. Illinois, 343 U.S. 250, 275 (1952).